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In The

Supreme Court of the United States

October Term, 1980

PAUL BENDETTI, DENNIS MASTRO and PETER de LAMOS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not the trial court denied the petitioners their constitutional right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esq. to participate in all stages of the trial of this matter.

2. Whether or not an actual conflict of interest existed at the time the trial court refused to allow Oscar B. Goodman, Esq. to participate in all stages of the trial of this matter.

3. Whether or not there was a valid waiver of any conflict of interest by the petitioners prior to the trial court's refusal to allow Oscar B. Goodman, Esq. to participate in all stages of the trial of this matter.

PARTIES

The parties to this proceeding are: Paul Bendetti; Dennis Mastro; and Peter de Lamos since they are the three defendants who were originally represented collectively by Oscar B. Goodman, Esq. The defendant Ruggerio Boiardo and the defendant Philip Leone, who were named in the original indictment, were severed from this case by the Judge of the United States District Court for medical reasons. The defendant James Vito Montemarano is still pending trial pursuant to the indictment in question. Elliott H. Vernon, Esq., attorney for the petitioners herein, is the individual trial counsel for the petitioner Peter de Lamos, and is a member in good standing of the bar of this Honorable Court. He has been authorized to file the within petition for the petitioners Bendetti and Mastro by Frank T. Swain, Esq. and John J. Momot, Jr., Esq., their respective individual trial counsel.

TABLE OF CONTENTS

Page

Questions Presented i

Parties i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of Facts 2

Reasons For Granting the Writ:

I. The trial court denied the petitioners their constitutional right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esq. to participate in all stages of the trial of this matter . . 11

Conclusion 21

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1970) 20

Cuyler v. Sullivan, 100 S. Ct. 1708 (1980) 16, 17, 20

Dukes v. Warden, 406 U.S. 250 (1972) 16

Faretta v. California, 422 U.S. 806 (1976) 15, 16

Glasser v. United States, 315 U.S. 60 (1942) 14, 16

Holloway v. Arkansas, 435 U.S. 475 (1978) ..12, 14, 15, 16, 17

Powell v. Alabama, 287 U.S. 45 (1932) 11, 20

Raymond Wood, et al., Petitioners v. State of Georgia, No. 79-6027 (Decided March 14, 1981) 17, 18

State v. Bellucci, 81 N.J. 531, 410 A. 2d 666 (1980) 20

State v. Sugar, 84 N.J. 1, 417 A. 2d 273 (1980) 19

United States v. Alvarez, 580 F. 2d 1251 (5th Cir. 1978)..12, 16

United States v. Armedo-Sarmiento, 524 F. 2d 591 (2nd Cir. 1975) 16

United States v. Benson, 592 F. 2d 257 (5th Cir. 1979) ... 12

Contents

United States v. Brown, 591 F. 2d 307 (5th Cir. 1979) ... 12

United States v. Brown, 600 F. 2d 248 (10th Cir. 1979) .. 12

United States v. Burton, 584 F. 2d 485 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) 11, 12

United States v. Cox, 580 F. 2d 317 (8th Cir. 1978) 16

United States v. Dolan, 570 F. 2d 1177 (3rd Cir. 1978) 13, 14, 15, 19

United States v. Garcia, 517 F. 2d 272 (5th Cir. 1975) ... 16

United States ex rel. Hart v. Davenport, 478 F. 2d 203 (3rd Cir. 1973) 3, 18

United States v. Levy, 577 F. 2d 200 (1978) 13

United States v. Medel, 592 F. 2d 1305 (5th Cir. 1979) ... 12

United States v. Waldman, 579 F. 2d 649 (1st Cir. 1978).. 12, 16

Zuck v. Alabama, 588 F. 2d 436 (5th Cir. 1979), cert. denied, 100 S. Ct. 63 13

Statutes Cited:

18 U.S.C. §1962(c) 2

18 U.S.C. §2314 2

Contents

Page

18 U.S.C. §1952 2

18 U.S.C. §2 2

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Fifth Amendment 2

Sixth Amendment 14, 16, 17

Rules Cited:

Federal Rules of Criminal Procedure:

Rule 44 ..... 13, 14, 15

Rule 44(c) 14

Other Authority Cited:

D.R. 5-105(C) 15

APPENDIX

Appendix A — Memorandum Opinion Dated September 3, 1980 ..... 1a

Appendix B — Judgment Order of the United States Court of Appeals for the Third Circuit Dated January 19, 1981. 21a

Contents

Page

Appendix C — Order Denying Petition for Rehearing Dated February 17, 1981 ..... 23a

Appendix D — Certified Copy of Judgment Order Dated February 25, 1981 ..... 25a

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OPINIONS BELOW

The only opinion rendered by the United States District Court for the District of New Jersey regarding the within issue was a memorandum opinion issued from the bench denying participation of Oscar B. Goodman, Esq. in all stages of the trial in this matter; this opinion is set forth in Appendix A, *infra,* p. 1a. The judgment order of the United States Court of

Appeals for the Third Circuit affirming the judgment of the District Court was issued on January 19, 1981 and is set forth in Appendix B, *infra,* p. 21a. The order denying the petition for rehearing *in banc* was entered on February 17, 1981 and is set forth in Appendix C, *infra,* p. 23a.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying the petition for rehearing *in banc* was entered on February 17, 1981 (23a). A certified copy of the judgment order was issued in lieu of a formal mandate on February 25, 1981. *See* Appendix D, *infra,* p. 25a. This petition for writ of certiorari was filed less than 60 days from the date of the aforesaid order and less than 30 days from the date of the issuance of the mandate. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

On September 27, 1979, a fifteen count indictment was returned against Paul Bendetti, Dennis Mastro, Peter de Lamos and others in the United States District Court for the District of New Jersey. The aforementioned fifteen count indictment alleged violations of Title 18 U.S.C. §§1962(c), 2314, 1952 and 2. In essence, the indictment alleges that from December 1975

through September 1979, in the Districts of New Jersey and Nevada, the defendants engaged in acts of "hidden ownership" of a Nevada gaming corporation, known as the "Jolley Trolley" casino, transported monies between Nevada and New Jersey in furtherance of said "ownership," participated in a bribe of a Nevada law enforcement officer, concealed the "true owners" of the Nevada gaming corporation from the Nevada gaming authorities as well as from a licensed owner of said gaming corporation who resided in Nevada.

On October 10, 1979, six defendants in the above captioned matter were arraigned before the Honorable Frederick B. Lacey, sitting below. Elliott H. Vernon, an attorney at law of the State of New Jersey and a member of the bar in good standing of the United States District Court for the District of New Jersey, formally moved the admission of Oscar B. Goodman, an attorney at law of the State of Nevada, *pro hac vice* for the joint representation of the petitioners herein (T2-3).

Subsequent to conducting an inquiry pursuant to *United States ex rel. Hart v. Davenport*, 478 F. 2d 203 (3rd Cir. 1973), *id.* 14 *et seq.*, each petitioner indicated that he wanted Mr. Goodman to represent him and perceived no conflict of interest in such joint representation. During a discussion of the advantages and disadvantages of joint representation, Mr. Goodman indicated that at the time of trial each of the petitioners would be represented by separate counsel, one of whom would be he. *Id.* 20-22.

Subsequent to October 10, 1979 and, more particularly, on November 5, 1979 the court below made the following ruling:

> "Now, if Mr. Goodman wants to stay in this case as sort of a general counsel for these three defendants, founded upon his knowledge of the

peculiar features of the case that he feels enable him to serve the three people so well, he's going to have to do this as well. Each one now is going to have to get separate counsel and then the assessment can be made by each of the individual counsel as to the extent to which Mr. Goodman can remain in the case representing the three defendants.

And on that basis, Mr. Goodman, I will permit you to remain in the case." (T36-6 to 16).

On November 5, 1979, an order was filed by the court below stating the following:

"This matter having been opened to the Court by Frederick B. Polak, Special Attorney on behalf of the United States, for an Order disqualifying Oscar B. Goodman, Esq. from the representation of the three defendants Paul Bendetti, Dennis Mastro and Peter DeLamos,

IT IS on this 5 day of November, 1979,

ORDERED and ADJUDGED that each of the three defendants, Paul Bendetti, Dennis Mastro and Peter DeLamos are to obtain separate counsel in this matter by November 19, 1979; and it is further

ORDERED and ADJUDGED that each such separate counsel must evaluate the case of his client and determine whether Mr. Goodman's continued representation of the three defendants

> through the pre-trial phases of this matter constitutes a conflict of interest; and it is further
>
> ORDERED and ADJUDGED that such decision be made known to this Court as soon as practicable."

Subsequent thereto, an additional hearing was held on December 10, 1979 regarding the issue of counsel. During the hearing on the aforementioned date, the following dialogue took place between the court and the attorney for de Lamos:

> "THE COURT: All right. Now, is the fact that Mr. Goodman remains in the case to represent all three of the defendants in some manner that I have not yet penetrated to, is that acceptable to you?
>
> MR. VERNON: It certainly is, your Honor. I perceive no conflict. He's here as a general counsel predicated upon the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada." (T17-17 to 20).

Upon questioning by the court with regard to the specific function of the specially admitted counsel, the following dialogue resulted between the court and the attorney for de Lamos:

> "THE COURT: Now, what is — exactly is his function to be as he represents all three of the defendants? I want counsel to hear this and I want the other two defendants to hear this as well.

What do you understand his function to be?

MR. VERNON: It's my understanding that he will participate in all pretrial and trial proceedings of this matter as a general counsel, which is the term the court utilized, and he will assist specific counsel, individual counsel, in any way they so request.

THE COURT: Well, don't use terms like 'general counsel,' because that may have been all right for my shorthand but now I have to find out exactly what he's going to do so when I put the questions to other counsel and the other defendants I get a knowledgeable and meaningful answer. What is he going to do?

MR. VERNON: He's going to participate in an of counsel capacity to the three individual counsel. He will make certain presentations to the court on the .eturn date of the motions. That may include required testimony on a pretrial basis in which questioning he would participate and at the close of which he would present argument to the court.

It's also my understanding he will participate in all phases of the trial to include questioning of witnesses.

It is my further understanding that —

THE COURT: And whom will he represent when he appears at trial? All three of the defendants?

MR. VERNON: I believe he would have to, your Honor. At the request of the three individual counsel.

THE COURT: Well, how does that react with the problem we foresaw in the first instance, given the fact that there's a conspiracy charged?

MR. VERNON: I think that the air can be cleared with regard to that —

THE COURT: How —

MR. VERNON: — assuming the stage or phase of a jury trial is reached, if it's made known at the outset that he is here at the request of the three individual counsel because of the intricacies of the case and assuming that the defenses remain consistent and there is nothing in the record or in anything I've read or the other counsel have read which would lead any of us to believe that the defenses would ever become inconsistent, then he would present whatever questioning or whatever argument we deemed appropriate to the court.

THE COURT: You recognize this is a highly unusual situation?

MR VERNON: I do so recognize it, and I do so very carefully, but the complexities of the case and it being such an unusual situation mandate that we continue in this fashion." *Id.* 18-1—20-2.

Subsequent to this dialogue, the court inquired as to whether or not the petitioners and their respective individual

counsel agreed with the role Mr. Goodman was to play as described by Mr. Vernon. All of the petitioners and their respective counsel agreed with such role. On July 29, 1980, at a status conference, the court made the following observations with regard to Mr. Goodman:

> "Defense counsel are expected to cooperate with the court, and I'm sure that I can count on defense counsel to cooperate with the court. I am not at all happy about what I sense is a recalcitrance of Mr. Goodman's part. If I have to I will remove him from the case. My own analysis of the defense thus far is that the defendants have capable counsel here representing them today. I never have seen any reason for Mr. Goodman being in the case. I did, however, want to accord the defendants some degree of cooperation from this court since they seemed to want Mr. Goodman. But I'm still concerned about what may be a potential conflict. And before the trial begins I'm going to assess once more whether Mr. Goodman really should be in this case.
>
> Now, what all of this means further is that each of the counsel present here today is expected to represent his own individual client and be prepared to represent that client in full, one hundred percent, at the trial because it may well be that before that trial begins I'm going to bar Mr. Goodman from performing at this trial.
>
> So if you gentlemen are inclined — have been inclined up till now to rest upon oars — I don't

> say that's the case, indeed I'm sure it's not the case — don't be resting on your oars between now and September 9." (T15-21—T16-18).

Immediately subsequent to the aforementioned commentary by the court which was fraught with uncertainty, counsel for de Lamos made the following statement to the court:

> "MR. VERNON: That's my dilemma. And that's why I'm seeking the assistance of the court in making a ruling as to Mr. Goodman. They — and I'm sure the other two counsel will echo my sentiments — want to know what Mr. Goodman's status is going to be. Not only whether or not he's going to be in this case but what is going to be his degree of participation. Is he going to be permitted to open, to question, to cross-examine, to direct, if, in fact, we present witnesses, and is he going to be in a position to close or sum up. And with that in mind what are the three counsel going to be permitted to do. And I think I outlined what we felt Mr. Goodman would be doing during one of the Hart v. Davenport hearings. I think we had three all together." *Id.* 20-16—21-4.

In light of this continuing inquiry, the court made certain findings as to the status of Oscar B. Goodman, Esq. with regard to his representation of all three of the petitioners. Those findings, which are contained in pertinent portions of the transcript of July 29, 1980, were amplified on September 3, 1980 in the memorandum opinion of the court as follows:

> "*Opening statements:* It is impossible to predict at this stage whether one or all of the defendants

may want to waive opening, and if they open what the opening should comprise. Nonetheless, it is clearly in the best interests of each defendant that his own lawyer open for him. Goodman will not be permitted to open jointly for the three defendants.

Summation: The procedure and the reasons therefor are as they are set forth under 'Opening Statement.' Indeed, common sense and experience dictate that at the conclusion of the trial each defendant will have, at the very least, different shades of emphasis on argument, if not totally different arguments, and in making such must have his own case presented undiluted by arguments from his counsel which are addressed to the case against — and for — the other defendants.

Witnesses: Much of this aspect has to be handled on an ad hoc basis, witness by witness. If a technical matter arises, e.g., an aspect of electronic surveillance, and all counsel and their clients are satisfied that Goodman can best handle direct or cross of that particular witness, I will, after appropriate inquiry, permit him to do so, acting for all three defendants, with appropriate instructions being given to the jury. If on cross, his examination will be in place of all three counsel, not in addition to the examinations performed by counsel.

Legal arguments: If all three defendants' counsel agree that a particular legal argument can be best presented by Goodman, and their clients agree, I

> will permit him to make such, again, where the jury is present, after appropriate instruction is given to the jury." (T18-11—T19-16).

The petitioners deemed this action on the part of the trial court to be a deprivation of their constitutional right to counsel of their choice and a denial of effective assistance of counsel; accordingly, a notice of appeal from an order yet to be entered was filed on August 28, 1980. In light of a scheduled trial date of September 9, 1980, prior to the convening of the United States Court of Appeals for the Third Circuit on September 15, 1980, a notice of motion for a stay of proceedings pending appeal was filed on August 29, 1980 which stay was granted by the trial court on September 3, 1980.

REASONS FOR GRANTING THE WRIT

I.

The trial court denied the petitioners their constitutional right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esq. to participate in all stages of the trial of this matter.

The Sixth Amendment right to counsel includes the right to retain and to be represented by the attorney of one's choice. *Powell v. Alabama,* 287 U.S. 45, 53 (1932). The Court in *Powell* held that a defendant should be afforded an opportunity to secure counsel of his own choice. This right, however, is not absolute and must be balanced against the interests of the court in the effective administration of justice. This balancing test has been used to deny a continuance to replace retained counsel, to limit a defendant's selection of counsel to a member of the bar, and to restrict the choice of appointed counsel. *See United States v. Burton,* 584 F. 2d 485 (D.C. Cir. 1978), *cert. denied,*

439 U.S. 1069 (1979); *United States v. Brown,* 600 F. 2d 248 (10th Cir. 1979); *United States v. Benson,* 592 F. 2d 257 (5th Cir. 1979); *United States v. Brown,* 591 F. 2d 307 (5th Cir. 1979).

The representation of multiple defendants by a single attorney, whether required or permitted, is not per se a denial of the constitutional right to effective assistance of counsel. *Holloway v. Arkansas,* 435 U.S. 475 (1978); *United States v. Medel,* 592 F. 2d 1305 (5th Cir. 1979); *Zuck v. Alabama,* 588 F. 2d 436 (5th Cir. 1979); *United States v. Waldman,* 579 F. 2d 649 (1st Cir. 1978).

In *Holloway v. Arkansas, supra,* the Court held that when a *defense counsel* asserts that a risk of conflict of interest exists, and the trial court fails to closely examine this claim, reversal is required without proof of prejudice. In *Holloway,* a public defender was appointed to represent three men charged with crimes. Although defense counsel stated that there was a possibility of conflict among the defendants, the trial court denied the attorney's motions for separate counsel. When all three of the defendants testified, the defense attorney was effectively precluded from directly examining them and could not cross-examine them because of the possibility of incriminating one or all of the defendants. For this reason, the Court concluded that the defendants had been denied effective assistance of counsel. In *United States v. Alvarez,* 580 F. 2d 1251 (5th Cir. 1978), the court applied the reasoning of *Holloway* and reversed the defendant's conviction, holding that when an attorney, whether retained or appointed, operates under an *actual* conflict of interest, an accused is deprived of his right to effective assistance of counsel even if there has been no showing of prejudice. The court noted, however, that an *actual,* not potential, conflict must be demonstrated and that a defendant may waive conflict-free representation if the waiver is knowing and intelligent.

In *Zuck v. Alabama,* 588 F. 2d 436 (5th Cir. 1979), *cert. denied,* 100 S. Ct. 63, the Fifth Circuit set forth criteria to be used in determining whether the defendant has made a valid waiver. The Government is required to show that the defendant is aware of the conflict, realizes the consequences that may result from such a conflict, and is aware of his right to separate representation.

In contrast, the Third Circuit has held in *United States v. Levy,* 577 F. 2d 200 (1978) that nothing short of an on-the-record disclosure by the trial court to a defendant of a potential conflict that may result from multiple representation coupled with an on-the-record inquiry regarding the waiver of separate representation will satisfy the requirements of the Sixth Amendment. This Circuit has also held that in conflict situations, a trial court may disregard defendant's waiver and order substitute counsel. *United States v. Dolan,* 570 F. 2d 1177 (3rd Cir. 1978).

The proposed amendment to Rule 44 of the Federal Rules of Criminal Procedure attempted to clarify the duties of officers of the court in cases involving joint representation. This amendment was scheduled, but did not take effect on December 1, 1980, and provided that whenever joint representation exists, the trial court must personally advise each defendant of the right to effective assistance of counsel, including the right to separate representation. Furtnermore, unless the court has good cause to believe that a conflict will not arise, the court must take "such measures as may be appropriate" to protect each defendant's rights.

If a conflict is found, the issue of prejudice must then be resolved. A hearing conducted by the court prior to trial constitutes substantial evidence of a valid waiver and places the burden of proving actual prejudice on the defendant.

If a trial court detects the possibility of an actual conflict, the question remains as to whether it can demand separate representation over the objections of the defendants. Allowing the trial court to order separate representation can be justified only on the assumption that the trial court can decide that the defendants' waivers are not intelligent or that the court in its supervisory power can override the defendants' desires. The Third Circuit, in *United States v. Dolan, supra,* based its ruling on its belief that a defendant cannot give a knowing waiver of the right to conflict-free representation. This approach threatens the defendant's right to choose his own counsel, a constitutional issue of great magnitude.

The *Dolan* opinion, and the proposed amendment to Rule 44 of the Federal Rules of Criminal Procedure, pose difficult constitutional questions. The main question herein is whether a court can impose separate counsel on a protesting defendant. As part of the defendant's right to choose his own defense, can the defendant choose an attorney who has or may have a conflict of interest? That is, if the Sixth Amendment guarantees the defendant the right to conflict-free representation, can the defendant waive that right?

It is hereby proffered by the petitioners that all that is required is inquiry by the court, and that the court inform the defendants of the right to separate representation. The Supreme Court in *Holloway, supra,* and *Glasser v. United States,* 315 U.S. 60 (1942) suggests that each defendant has the right to a separate, personal attorney. Because only an informed defendant can waive the right of counsel, whatever the contours of that right, a waiver of this Sixth Amendment right is binding only if it satisfies the most demanding tests of notice and knowledge. If this analysis is correct, the proposed Rule 44(c) was unconstitutional because it required neither a conflict inquiry by the trial court nor notice to the defendants of their rights.

The question of whether the court may impose separate counsel over a defendant's objection is also a constitutional question raised by the proposed amendment to Rule 44. The Advisory Committee Notes to proposed Rule 44 seem to permit the court to pursue this option in its discretion. The Advisory Committee cites *United States v. Dolan, supra,* as support for the constitutionality of this course of action. *Dolan, supra,* appears to be the only decision holding that a court may disqualify counsel even when the defendant objects and executes an informed waiver. It is submitted that *Dolan* does not support the reach of this rule. In *Dolan,* defense counsel had an actual conflict in representing two defendants, a conflict that the Court of Appeals thought potentially crippled a fair and effective defense. Although the court discussed the clash between the defendant's right to select counsel and his right to effective representation, the court did not approve of disqualifying counsel solely on the ground that the defendant had no right to select conflict-laden counsel under *Faretta v. California,* 422 U.S. 860 (1976). Instead, the court appeared to rest its decision on the trial court's supervisory power to bar an attorney who violated his ethical obligations. Because an actual conflict existed, the court thought that the attorney would violate D.R. 5-105(C) by continuing to represent a defendant willing to waive the effect of any conflict. The court thus implied that its supervisory power gave the trial court authority to disqualify an attorney when the trial judge was not satisfied that a waiver was proper.

The Court in *Holloway, supra,* casually brushed aside this constitutional question by noting that "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interest." 435 U.S. at 483 n. 5.

As noted above, other than the Third Circuit, courts of appeals have concluded that a defendant has the right to

conflict-laden counsel as long as he waives any objection. *See United States v. Alvarez,* 580 F. 2d 1251 (5th Cir. 1978); *United States v. Cox,* 580 F. 2d 317 (8th Cir. 1978); *United States v. Waldman,* 579 F. 2d 649 (1st Cir. 1978); *United States v. Armedo-Sarmiento,* 524 F. 2d 591 (2nd Cir. 1975); *United States v. Garcia,* 517 F. 2d 272 (5th Cir. 1975). These decisions are basically founded upon the decision of the Supreme Court in *Faretta v. California,* 422 U.S. 806 (1976). The *Faretta* decision held that the Sixth Amendment gives a defendant the right to structure his own defense. Among his options is the option of self-representation, even if his choice of that option appears suicidal. If a defendant may foolishly choose to represent himself, these decisions reason, the defendant may also foolishly choose to have a conflict-burdened attorney. It is submitted that this interpretation of *Faretta* is correct, and it therefore follows that the right to counsel, when a defendant wants a particular attorney, does include the right to choose a counsel who is conflict-laden. A defendant who decides to proceed with a conflict-burdened attorney — one whose effectiveness might be subject to question — is therefore able to waive his right to effective representation, as is a defendant who chooses to represent himself.

A recent decision of the United States Supreme Court in this area is *Cuyler v. Sullivan,* 100 S. Ct. 1708 (1980). It is noted with interest that this decision arose in the Third Circuit. The Court held that they were unwilling to accept the Third Circuit's standard, that the mere possibility of conflict is sufficient to establish a Sixth Amendment violation. *Citing, Glasser v. United States, supra,* and *Dukes v. Warden,* 406 U.S. 250 (1972), the Court concluded that the appropriate showing is an actual conflict of interest. In *Cuyler, supra,* Sullivan claimed that he was denied the effective assistance of counsel based upon his attorney's conflict of interest. The court stated that the *Holloway* decision reaffirmed that multiple representation does

not violate the Sixth Amendment unless it gives rise to a conflict of interest. The court further held that since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. A defendant who raises no objection at trial to multiple representation must demonstrate that an actual conflict of interest adversely effected his attorney's performance. The court held that a possibility of a conflict of interest is insufficient to impugn a criminal conviction. In order to demonstrate a violation of the Sixth Amendment right, the defendant must establish that an actual conflict of interest adversely affected the performance of his attorney.

During the preparation of the within petition and, more particularly, on March 18, 1981, counsel for the petitioners became aware of *Raymond Wood, et al., Petitioners v. State of Georgia,* No. 79-6027 argued before this Honorable Court on November 4, 1980 and decided on March 4, 1981. After a discussion of the constitutional right to counsel in conjunction with *Cuyler, supra,* and *Holloway, supra,* this Honorable Court reached the following conclusion:

> "For these reasons, we base our decision in this case on due process grounds. The judgment below is vacated and the case remanded with instructions that it be returned to the State Court for Fulton County. The court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent

> counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interest."

Accordingly, this Honorable Court has established a two-fold test for the disqualification of counsel: first, it must be shown that an *actual conflict* of interest existed; and, secondly, that there was *no valid waiver* of the right to independent counsel. Since there was no substantial inquiry into the conflict issue in *Wood, supra,* the case was remanded for further findings concerning a due process violation.

Under the facts of the case at bar, no evidence of an *actual conflict* has been presented to the court. Further the petitioners herein have waived any prejudice from what may be a conflict, which could arise during the course of this trial, and such waiver has been knowledgeable and intelligent during the course of several *Hart v. Davenport* hearings conducted by the trial court.

Additionally, a false impression has been created that Mr. Goodman would be exclusively responsible for the representation of the petitioners herein. The appearance of exclusive representation is undercut in this case by the ever-presence of the three aforementioned independent counsel for the respective petitioners. Mr. Goodman's role in this proceeding is that of an adjunct attorney, skilled in Nevade rules and regulations and laws and Nevada casino laws which are intimately intertwined with the totality of the Government's case. Independent counsel will safeguard any conflict which may arise during the trial between the petitioners.

The conspiracy charge has been highlighted as if it is the foremost, if not the exclusive charge, in the indictment; when, in fact, there is a fifteen count indictment involving violations of Nevada law. Great weight has been placed on the aura of

collusion that might emanate by active participation of Mr. Goodman in all phases of the trial and this excuse is used to justify his total emasculation from participation in the trial. His role has been reduced to that of a silent adviser and, accordingly, he is effectively stripped of his vocal cords and thereby precluded from participating in the dynamics and spontaneity of the trial.

In the final analysis, the conflict which does exist is not the conflict of Oscar B. Goodman's multiple representation but, on the contrary, the conflict between the "per se" rule espoused by *Dolan, supra,* and the petitioners' right to counsel of their own choice. Justice Pashman recently stated in the case of *State v. Sugar,* 84 N.J. 1, 12, 417 A. 2d 273 (1980):

> "(1) If the rule of law is the nation's secular faith, then the members of the Bar are its ministers. A lawyer is the mediator between his client's desires and the sovereign's commands. His aid is sought because of the relative ignorance of those to whom the law is but a collection of dim mysteries. When confronted with the awesome power of the criminal process, a client is never more in need of professional guidance and advocacy. In this setting, an instinct for survival compels a defendant to confide in an attorney. The necessity of full and open disclosure by a defendant, see American Bar Ass'n., Code of Professional Responsibility, EC 4-1 at 21C (1976), imbues that disclosure with an intimacy equal to that of the confessional, and approaching even that of the marital bedroom. *Cf. Griswold v. Connecticut,* 381 U.S. 479, 484-486, 85 S. Ct. 1678, 1681-1682, 14 L.Ed.2d 510 (1965)."

In the case at bar, the petitioners herein entered into just such a relationship with Oscar B. Goodman, Esq. The lower court, by virtue of its unusual ruling, has denied the petitioners of the "effective assistance" of his counsel. Because the Constitution requires the assistance of counsel and not merely his physical presence, counsel must be effective as well as available. *Cuyler, supra,* at 1716. Furthermore, the right to counsel would be an empty assurance if a formal appearance by an attorney, as in this case, were sufficient to satisfy it. *Avery v. Alabama,* 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1970).

It is axiomatic that the circumstances under which a lawyer provides counsel must not "preclude the giving of effective aid in the preparation and trial of the case." *Powell, supra,* at 71. In the case at bar, Oscar B. Goodman's counsel in the trial of this case is not only precluded but specifically prohibited by virtue of the lower court's ruling. In *State v. Bellucci,* 81 N.J. 531, 538, 410 A. 2d 666 (1980), the New Jersey Supreme Court held that a defense attorney's representation must be "untrammeled and unimpaired." Since the District Court and Court of Appeals herein have deemed it inappropriate to permit Oscar B. Goodman's representation to be "untrammeled and unimpaired," those decisions are suspect and, accordingly, a review by this Honorable Court is mandated.

CONCLUSION

For all of the foregoing reasons and authorities set forth herein, it is respectfully submitted that this Honorable Court must find that the trial court and the Court of Appeals rendered questionable, if not improper, decisions involving the constitutional right of the petitioners to counsel of their choice and the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esq. to participate in all stages of the trial of this matter, which decisions are in conflict with the applicable decisions of this Court; accordingly, the principals of justice and fundamental fairness mandate that this Honorable Court exercise its power of supervision and grant the within petition for a writ of certiorari.

Respectfully submitted,

ELLIOTT H. VERNON
VERNON, WHITMORE & McGUIRE
Attorneys for Petitioners

APPENDIX A — MEMORANDUM OPINION DATED SEPTEMBER 3, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 79-321

UNITED STATES OF AMERICA

v.

PAUL BENDETTI, DENNIS MASTRO, PETER DE LAMOS, and JAMES VITO MONTEMARANO,

Defendants.

Newark, New Jersey
September 3, 1980

BEFORE:

The Honorable FREDERICK B. LACEY, U.S.D.J.

Appearances:

ROBERT J. DEL TUFO, United States Attorney
By FREDERICK B. POLAK, Special Attorney, Strike force,
and
HELEN MOLLICK, Trial Attorney, Department of Justice
For the Government

Appendix A

ELLIOTT H. VERNON, Esq.
For the Defendant DeLamos

JOHN J. MOMOT, JR., Esq. [NV]
For the Defendant Mastro

FRANK T. SWAIN, Esq.
For the Defendant Bendetti

OSCAR B. GOODMAN, Esq. [NV]
For the above-named defendants

RICHARD T. PHILIPS, Esq.
For the Defendant Montemarano

On October 10, 1979, six defendants in the above-captioned matter were arraigned before this court. On the motion of Elliott H. Vernon, Esq., Oscar B. Goodman, Esq., was specially admitted to this district in order that he be permitted to represent three of the defendants: Paul Bendetti, Dennis Mastro and Peter DeLamos. After all of the defendants were arraigned, pursuant to *United States ex rel Hart v. Davenport,* 478 F.2d 203 (3d Cir. 1973), I conducted an inquiry concerning the advantages, disadvantages and conflicts of interest arising from Mr. Goodman's joint representation of the three.

This *Hart v. Davenport* hearing was conducted on October 10, 1979. Tr. 14 *et seq.* I thoroughly covered the dangers and risks of multiple representation. Each defendant, *Id.* 39, indicated he wanted Goodman to represent him during the pretrial stage.

Significantly, I pointed out the dangers in three defendants, charged as here with conspiracy, having the same counsel. *Id.*,

19-20. Goodman responded that he was aware of the problem and said:

> . . . it would be my intention, your Honor, that if this court would permit me to remain in the case that at the time of trial each of the defendants would be represented by separate counsel.

Tr. 20, lines 16-19.

Goodman held out to me that as an attorney from Las Vegas he was able to provide the defendants during the pretrial stage expertise other counsel lacked:

> . . . I have found throughout the years that gentlemen who are associated with Las Vegas, who are represented by attorneys who do not come from Las Vegas, when those gentlemen are charged with cases involving Nevada law, involving casinos, involving skimming, involving hidden ownership, that the attorneys who don't live there have done their clients a disservice by taking those cases because they're unable to relate to the jury the atmosphere and the flavor of Las Vegas and how business is done there.
>
> I would respectfully suggest to the court that with these gentlemen having independent counsel at the time of trial that certainly they would be entitled no less at this point in time to have a Nevada attorney who is familiar with Nevada rules and regulations and laws go through the pretrial matter. . . .

Appendix A

Id. 28, lines 2-16.

This intimation of expertise, accompanied by Goodman's reiteration of his recognition that each defendant should have independent counsel at trial, led me to conclude that hearing by permitting him to represent the three defendants [Bendetti, Mastro and DeLamos] at the arraignment. I stated:

> . . . based on all I've heard I will make a finding, a *Hart v. Davenport* finding that as I indicated in the Garofola opinion given the limits that are imposed upon my ability to inquire at this point I cannot say that there is a conflict in interest between the three defendants represented by Mr. Goodman, And, therefore, I will permit him to stay in the case.

In view of the extensive recordings counsel indicated were involved, I set a liberal motion schedule and a tentative trial date in January 1980.

At the conclusion of the October 10 hearing, Frederick Polak, Esq., stated he would file a formal notice of disqualification directed at Goodman. This led to another hearing, on November 5, 1979.

Polak there stated that he had been hampered in discussing immunity and cooperation with Goodman's clients because of the multiple representation. Tr. of November 5, 1979, 3; that Goodman represented an unindicted co-conspirator; that government information, made available to Goodman, indicated that his own clients saw themselves differing in their degrees of culpability; that it was impracticable to allow Goodman to make all the pretrial motion decisions and thus "lock in" the

independent trial counsel Goodman had recognized would be necessary; and that the case was a complicated one, covering three years, over 100 overt acts, with the probability of numerous unforeseen developments during pretrial and trial. *Id.*, 3-6. Polak concluded:

> We believe that the longer Mr. Goodman is in the case the longer these defendants will be affected. To act now will save potential continuances, mistrials, perhaps appellate attacks, and permit an individual attorney representing each one of these defendants to review the discovery materials fully and make an independent determination of what motions they can make in the defendant's best interest.

Id. 6, lines 10-16.

Goodman once again emphasized his expertise in connection with "the Nevada situation," and that he "should be permitted to remain in the case if for no other reason at least until such time as the validity of the wiretaps is challenged." *Id.*, 13, lines 12-18.

Once again he noted his understanding that Bendetti, DeLamos and Mastro would "have independent counsel representing their interests at the time of trial." *Id.*, 13, lines 21-22. Goodman did not file a sworn denial of Polak's affidavit averring he, Polak, had discussed with Goodman granting immunity to one of his clients in return for getting his cooperation against the others. *Id.* 16-17. There was, however, this exchange:

THE COURT: All right. I take it — and you told me that you have taken up with them the necessity that they will have to have separate counsel at trial.

MR. GOODMAN: Absolutely.

THE COURT: And they're agreeable to that?

MR. GOODMAN: They are. I wouldn't let them do it any other way.

Id. 17, lines 9-15.

Thereafter I dictated the following into the record:

I have read Court Exhibit 1 and Court Exhibit 2 [these were sealed at Goodman's request] and for the life of me I just cannot perceive how in the face of, A, the delicacies of the problem; B, the law as it stands today, and given the trend of — the direction of trend for tomorrow and everything we've covered at the last Hart hearing; and finally what's in these Court Exhibits 1 and 2 how Mr. Goodman wants to stay in this case. Compounding all of the problems that we have is the fact that *Mr. Goodman himself acknowledges that he can't try this case for three defendants, and each one has been so advised by him and each one has agreed that they would get separate counsel at trial.*

Now, what's the consequence of that? I have been told in the papers submitted to me this is a case of unusual complexity. Figures like thousands of hours of tapes have been thrown around this courtroom. I can perceive without exercising much imagination that when Mr. Goodman finally decided it was time to bow out and bring in trial counsel what would then happen? And rightly so. Trial counsel would say, "We can't be ready. This is a case of unusual complexity. There are thousands of hours of tapes that we're going to have to listen to. There are thousands of documents in Nevada and here that we're going to have to examine. Judge, our clients have a Sixth-Amendment right to have counsel represent them who are familiar with the case. And while we have a great deal of respect for Mr. Goodman, his reputation has preceded him here, nonetheless we have to do this job independently."

Now, if Mr. Goodman wants to stay in this case as sort of a general counsel for these three defendants, founded upon his knowlege of the peculiar features of the case that he feels enable him to serve the three people so well, he's going to have to do this as well. Each one now is going to have to get separate counsel and then the assessment can be made by each of the individual counsel as to the extent to which Mr. Goodman can remain in the case representing the three defendants.

> And on that basis, Mr. Goodman, I will permit you to remain in the case.
>
> MR. GOODMAN: Very good.
>
> THE COURT: On any other basis I will not be able to do it.
>
> MR. GOODMAN: That was anticipated, your Honor, and discussions have been ongoing with other counsel.
>
> THE COURT: All right. And I will direct further that given all of the problems of discovery in this matter that that be done within the next two weeks.
>
> And I think, Mr. Polak, you can discuss with Mr. Goodman the form the order should take. Do that out in the hall. Get the order prepared, get it submitted to me today and we'll get it filed. [emphasis supplied.]

Id. 35, line 5-37, line 3.

My reasoning was, as is reflected by the record, that the defendants would derive benefit from Goodman's claimed expertise in Nevada matters during pretrial but that each defendant would have to retain, then and there, counsel who would represent him at trial. Goodman's response, in the presence of Elliott H. Vernon, Esq. [who was retained shortly thereafter by DeLamos] and the three defendants [Bendetti, Mastro and DeLamos] indicates not only an understanding but an acquiescence in that ruling. An order was filed on November 5, 1979, as follows:

Appendix A

This matter having been opened to the Court by Frederick B. Polak, Special Attorney on behalf of the United States, for an Order disqualifying Oscar B. Goodman, Esq. from the representation of the three defendants Paul Bendetti, Dennis Mastro and Peter DeLamos,

IT IS on this 5 day of November, 1979,

ORDERED and ADJUDGED that each of the three defendants, Paul Bendetti, Dennis Mastro and Peter DeLamos are to obtain separate counsel in this matter by November 19, 1979; and it is further

ORDERED and ADJUDGED that each such separate counsel must evaluate the case of his client and determine whether Mr. Goodman's continued representation of the three defendants through the pre-trial phases of this matter constitutes a conflict of interest; and it is further

ORDERED and ADJUDGED that such decision be made known to this Court as soon as practicable.

Following retention of separate counsel I held still another hearing on December 10, 1979, to assure that the representation as arranged protected the rights of the defendants and was free of conflict. Tr. of December 10, 1979, 12.

Vernon had originally appeared as local counsel, with Goodman, for all three defendants. Now he was representing only DeLamos. Questioning of the defendants and counsel for

Bendetti and Mastro indicated there was, at this early juncture, no reason for not permitting Vernon to represent DeLamos. *Id.* 13, 16-17. *See* Vernon letter to the court, December 4, 1979, Court Exhibit 6.

Having approved Vernon's position as counsel for DeLamos, I put this question:

> THE COURT: All right. Now, is the fact that Mr. Goodman remains in the case to represent all three of the defendants in some manner that I have not yet penetrated to, is that acceptable to you?
>
> MR. VERNON: It certainly is, your Honor. I perceive no conflict. He's here as a general counsel predicated upon the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada.

Id. 17, lines 13-20.

Further questioning elicited that Frank T. Swain Esq., had represented DeLamos in a state investigation in New Jersey at the request of Goodman. Counsel and the parties, however, assured me that they consented to his representing Bendetti here; and I saw no basis, in the record before me, for barring Swain.

Next, I asked each counsel to state what he perceived Goodman's role to be. While each counsel asserted he had considerable criminal trial experience, it appeared each felt that Goodman's presence, even at trial, as a sort of adviser or "general counsel," was deemed desirable because of his

experience in "Las Vegas gaming," "RICO wiretapping," and, as noted by Vernon, "the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada." *Id.* 17, 21.

Nonetheless, counsel indicated they would not be displaced by Goodman:

> THE COURT: Who's going to make the final decision on what your client — what is best for your client, you or Mr. Goodman?
>
> MR. VERNON: My client is going to make that decision.
>
> THE COURT: Who gives him the advice?
>
> MR. VERNON: I will give him the advice.
>
> THE COURT: And not Mr. Goodman?
>
> MR. VERNON: Not Mr. Goodman.

Id. 20, lines 3-11.

John J. Momot, Esq., essentially saw Goodman's role as I have just defined it:

> The case deals with many issues dealing with RICO wiretapping and gaming regulations in which I, knowing Mr. Goodman for many years, recognize that he is very, very well-qualified in this area and I personally would be looking to

him for expertise in this area to assist in my representation of Mr. Mastro during the coming motions and trial itself.

THE COURT: You don't feel qualified to do it without Mr. Goodman's help?

MR. MOMOT: I do feel qualified; however, I do understand his expertise in this area —

THE COURT: In what area?

MR. MOMOT: Especially gaming, your Honor.

THE COURT: You mean Las Vegas gaming, Nevada gaming?

MR. MOMOT: Las Vegas gaming, yes, your Honor. And I think he would be of great assistance not only to counsel involved in this matter but to any and all defendants.

THE COURT: Mr. Swain.

First, let me just ask Mr. Momot one question. Excuse me just a minute.

MR. MOMOT: Yes, sir.

THE COURT: As you heard his role stated by Mr. Vernon, is that your understanding as well?

MR. MOMOT: That is my understanding, your Honor.

Id. 20, line 22, to 21, line 22.

I concluded the hearing by dictating the following into the record:

> Now, with respect to Mr. Goodman, let me say this. Given the responses I have received I will permit Mr. Goodman to remain in the matter in the role, Mr. Goodman, as you have described that role up to the point of trial. I will reserve at this point on whether I will permit him to appear at trial. I'm doing this for two reasons. First, I want to be sure that at the time trial begins, if, as you put it, it reaches that stage, all counsel and the three defendants will have an opportunity once again to express to me what their thinking is as regards Mr. Goodman appearing at trial and representing all three of the defendants.
>
> Secondly, I want to be in a position to say at that point that based upon the case as I know it and as I hear about it from counsel at that point, that there is in fact nothing but good that can flow to each of those defendants from having Mr. Goodman appear in the role as has been defined for him by you here today.
>
> Among the factors I will have to consider at that time will be what may be the appearance to

a jury of Mr. Goodman appearing for all three of those defendants.

Now, this means, therefore, since I am reserving on this at this point, that each of the three counsel that represents the three individual defendants here today will have to be prepared to the hilt to go forward without any assistance from Mr. Goodman at trial in the event I judge that to be necessary.

I am assured by each one of the three of you that you are, in fact, qualified by virtue of your own experience to handle these cases in the event Mr. Goodman should be barred. Each of you has told me that he has substantial experience in trying criminal cases and I'm satisfied with your assurances. I accept those assurances and I am satisfied with them.

I do not see the potential for harm in Mr. Goodman remaining in the case through the pretrial stages that I perceive there may be in his appearing at trial for the three defendants. But I am not ruling him off the reservation for trial. I'm simply reserving on it at this point. And I will, of course, hear from each of the defendants and from counsel at the time of trial in the event you renew your application at that point to have Mr. Goodman appear for all three of the defendants at trial.

Id. 30, line 13, to 32, line 4.

Thereafter, pretrial matters unfolded and the case was set for trial on September 10, 1980 as defendants required additional time to prepare.

On July 29, 1980, counsel were before me on various matters and the question of Goodman's participation at trial was raised. One issue related to the defense designation of the electronic tapes they intended to use at trial. I had ordered that this information be furnished so that questions of audibility and authentication could be resolved before trial.

One defense counsel stated that the tapes were in Las Vegas and "until the government puts its case in or commences this case, we don't know what tapes we're going to utilize." Tr. of July 29, 1980, 10, lines 16-17.

I stated that I had long ago required the government to provide copies of the recordings it was going to use, with transcripts, that technical evidence matters were being heard on those pretrial, and that the defense had to respond in kind. I noted that the defense was not being asked to forego surprise — the tapes they had were furnished to them at my direction by the State of New Jersey in cooperation with the United States. *Id.* 9-11; 13-16.

Further, referring to the fact the tapes were in Las Vegas, I noted that I was holding New Jersey counsel responsible for conforming to my order. I extended the date for compliance to August 13, 1980.

Thereafter, I dealt with Goodman's trial status. Before dealing with what Goodman's role at trial is to be, a discussion of applicable legal principles is appropriate. No elaborate review is necessary.

Appendix A

Counsel have been referred by me to *United States v. Dolan,* 570 F.2d 1177 (3d Cir. 1978) and *United States v. Garafola,* 428 F. Supp. 620 (D. N.J. 1977). I take it to be the law of this circuit that where the district court cannot satisfy itself that there has been a proper waiver of the Sixth Amendment right to effective assistance of counsel, he need not and, indeed, probably should not accept it. *United States v. Dolan, supra,* 570 F.2d at 1181.

I have meticulously probed into the matter on more than one occasion. Yet I cannot say that the "waivers" made by the defendants Bendetti, Mastro and DeLamos are knowledgeable and intelligent under *Johnson v. Zerbst,* 304 U.S. 458 (1938). The averments made by the United States on its motion heard last November have never been specifically denied. Moreover, the pretrial developments support the fact that these defendants may have differing interests and may have engaged in varying activity with respect to the principal government witness, the decedent Russo [whose testimony will be largely in the form of electronic recordings].

There can be no doubt that at trial these defendants are better served by each having his own separate and independent counsel. *Fryar v. United States,* 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied,* 395 U.S. 964 (1969).

Indeed, given what is so obvious to me, and was accepted by Goodman and the defendants in November, I am mystified by the desire now expressed that Goodman be permitted to take over the defense of all three of these defendants. *See* Notice of Motion for Stay of Proceedings Pending Appeal, p. 2, indicating an appeal is being taken from my decision "refusing to permit Oscar B. Goodman, Esq., to participate in all stages of the trial

of this matter on behalf of the defendants, Bendetti, Mastro and DeLamos. . . ." The situation is made even more puzzling by the fact that not once but several times Goodman agreed that, at trial, the defendants would have separate counsel, that they understood this, and that they were agreeable to this. Finally, in situations of multiple representation, the district judge is handicapped by the restrictions upon his ability to explore into the defenses of each defendant, the facts respecting each, what the government will offer as to each, what evidence will be offered by each, how each will want his defense conducted, how each will [with his counsel] want cross-examination conducted of witnesses implicating him or of witnesses implicating co-defendants but not him.

The reasons for separate and independent counsel are stated in Geer, Conflict of Interests and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119 (1977).

Simply by way of example, if a government witness implicates defendant A, but not defendant B, what is their joint counsel to do? He must shake the witness' testimony as to A, perhaps even suggesting that the witness is not credible. On the other hand, must he not, at some stage, note that the witness has not implicated B?

In the face of the "stonewalling" here by Goodman, a district court is placed in a difficult position. Defendants ordinarily should be permitted to have counsel of their choice. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir. 1976). *Cf. Cuyler v. Sullivan,* 48 U.S.L.W. 4517 (U.S. May 12, 1980); *United States v. Laura,* 607 F.2d 52 (3d Cir. 1979). Yet I cannot escape the persistent notion that there is more here than meets the eye. Why, I must ask, do all the defendants want

Goodman to represent them at every trial stage when it is so clear that their interests are better served by each having his own separate and independent counsel?

This same nagging question has been dealt with in other places. *See United States v. Garafola, supra,* 428 F. Supp. at 624 n. 7 and 627, citing and quoting from a paper by Alan T. Cole, Esq., former chairman of the Section of Criminal Justice, American Bar Association; and *see* ABA Standards Relating to the Defense Function, §3.5(b) at 159, 211, and 214. *See also, United States v. Quinones,* 613 F.2d 47 (3d Cir. 1980); *United States v. Provenzano,* 620 F.2d 985, 1004 (3d Cir. 1980).

While I cannot say that the reasons advanced in the Cole paper, as quoted in *Garafola,* are present here, I can say that defendants, at trial, will be far better represented by separate and independent counsel than by Goodman. I can also state that I cannot satisfy myself that their "waiver" is a knowing and intelligent one.

Accordingly, I will not permit Goodman to replace Vernon, Swain and Momot as counsel for the three defendants.

What role, if any, may Goodman perform at trial? Notwithstanding the fact that I have been given no specifics, as I was in connection with pretrial matters, the theme continues that Goodman has certain special expertise that defendants will require at trial, this notwithstanding Vernon, Swain and Momot are experienced in criminal defense work and were retained at a time when, as I have stated, the defendants and Goodman had agreed they would be trial counsel.

Nonetheless, I can accommodate the claimed necessity for Goodman's expertise with the defendants' right to separate and

independent [and effective] counsel under the Sixth Amendment.

I will permit Goodman to continue in his role as counsel to the three defendants so that he will be available as an adviser to the three counsel when and if they need his aid. He can, of course, sit at counsel table to be readily available. I emphasize, however, that I regard Messrs. Vernon, Momot and Swain as counsel for DeLamos, Mastro and Bendetti, respectively. In this way I can assure that trial decisions made by a defendant and his counsel will be made not in the light of how they serve all three, but rather how they serve that particular defendant.

At the hearing on July 29, 1980, I was asked to detail specifically what Goodman would be permitted to do at trial, Tr. of July 29, 1980, 16, *et seq.* I have reviewed what I there stated; and now, upon reflection, believe amplification of my remarks is appropriate.

Opening statements: It is impossible to predict at this stage whether one or all of the defendants may want to waive opening, and if they open what the opening should comprise. Nonetheless, it is clearly in the best interests of each defendant that his own lawyer open for him. Goodman will not be permitted to open jointly for the three defendants.

Summation: The procedure and the reasons therefor are as they are set forth under "Opening Statement." Indeed, common sense and experience dictate that at the conclusion of the trial each defendant will have, at the very least, different shades of emphasis on argument, if not totally different arguments, and in making such must have his own case presented undiluted by arguments from his counsel which are addressed to the case against — and for — the other defendants.

Appendix A

Witnesses: Much of this aspect has to be handled on an ad hoc basis, witness by witness. If a technical matter arises, e.g., an aspect of electronic surveillance, and all counsel and their clients are satisfied that Goodman can best handle direct or cross of that particular witness, I will, after appropriate inquiry, permit him to do so, acting for all three defendants, with appropriate instructions being given to the jury. If on cross, his examination will be in place of all three counsel, not in addition to the examinations performed by counsel.

Legal arguments: If all three defendants' counsel agree that a particular legal argument can be best presented by Goodman, and their clients agree, I will permit him to make such, again, where the jury is present, after appropriate instruction is given to the jury.

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 19, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA

v.

RUGGERIO BOIARDO, PAUL BENEDETTI, DENNIS MASTRO, PETER DE LAMOS, JAMES VITO MONTEMARANO and PHILIP LEONE

Paul Bendetti, Dennis Mastro and Peter DeLamos,

Appellants

Appeal from the United States District Court for the District of New Jersey
(D.C. Crim. No. 79-00321-02-03-04)
Submitted Under Third Circuit Rule 12(6)
January 15, 1981

Before: WEIS and HIGGINBOTHAM, *Circuit Judges* and McCUNE, *District Judge.**

After considering the contentions raised by appellants, to-wit, that the trial court denied the appellants their constitutional

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* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esquire, to participate in all stages of the trial of this matter, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Weis
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Jan. 19, 1981

Certified as a true copy and issued in lieu of a formal mandate on February 25, 1981.

Test: SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C — ORDER DENYING PETITION FOR REHEARING DATED FEBRUARY 17, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA,

Appellee

v.

RUGGERIO BOIARDO, ET AL.,

PAUL BENDETTI, DENNIS MASTRO, PETER de LAMOS,

Appellants

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges,* and McCUNE, *District* Judge.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Weis
Judge

Dated: February 17, 1981

APPENDIX D — CERTIFIED COPY OF JUDGMENT ORDER DATED FEBRUARY 25, 1981

Office of the Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

Sally Mrvos
Thomas F. Quinn
Clerk

Telephone
215-597-2995

February 25, 1981

Angelo W. Locascio, Esquire, Clerk
U.S. District Court
Federal Building
Newark, New Jersey 07102

Re: United States of America vs. Ruggerio Boiardo, et al.
Paul Bendetti, et al., Appellants
No. 80-2313
(D.C. Crim. No. 79-00321-02-03-04)

Dear Sir:

Enclosed herewith is a certified copy of the judgment order in the above-entitled case(s). This certified judgment order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Appendix D

We return herewith the record in this case and will appreciate your signing the enclosed list as a receipt for same.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment order is also enclosed showing costs taxed, if any.

Very truly yours,

s/ Sally Mrvos
Clerk

ald
Enclosure
cc: Elliott H. Vernon, Esquire
Oscar B. Goodman, Esquire
John J. Momot, Esquire
Maryanne T. Desmond, Esquire

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA

v.

RUGGERIO BOIARDO, PAUL BENEDETTI, DENNIS MASTRO, PETER DE LAMOS, JAMES VITO MONTEMARANO and PHILIP LEONE

Paul Bendetti, Dennis Mastro and Peter DeLamos,

Appellants

Appeal from the United States District Court for the District of New Jersey
(D.C. Crim. No. 79-00321-02-03-04)
Submitted Under Third Circuit Rule 12(6)
January 15, 1981

Before: WEIS and HIGGINBOTHAM, *Circuit Judges* and McCUNE, *District Judge.**

After considering the contentions raised by appellants, to-wit, that the trial court denied the appellants their constitutional right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esquire, to participate in all stages of the trial of this matter, it is

* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix D

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Weis
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Jan. 19, 1981

Certified as a true copy and issued in lieu of a formal mandate on February 25, 1981.

Test: SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit

No. 80-1615

JUN 1 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL BENDETTI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, each of whom is represented by separate counsel, will be deprived of effective assistance of counsel or of a right to counsel of their own choosing by the district court's order, entered for the purpose of preventing potential conflicts of interest at their pending trial, that limits participation by another attorney on behalf of all three petitioners.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Armstrong v. *McAlpin*, 625 F. 2d 433, cert. granted vacated and remanded on other grounds, No. 80–431 (Jan. 19, 1981)	14
Benjamin, In re, 582 F. 2d 121	14
Chambers v. *Maroney*, 399 U.S. 42	13
Community Broadcasting of Boston, Inc. v. *FCC*, 546 F. 2d 1022	14
Continental Investment Corp., In re, 637 F. 2d 1	14
Coopers & Lybrand v. *Livesay*, 437 U.S. 463	14
Cuyler v. *Sullivan*, 446 U.S. 335	10
Faretta v. *California*, 422 U.S. 806	9, 10, 16
Firestone Tire & Rubber Co. v. *Risjord*, No. 79–1420 (Jan. 13, 1981)	13, 14, 16
Holloway v. *Arkansas*, 435 U.S. 475	7
Leis v. *Flynt*, 439 U.S. 438	10
Lewin v. *United States*, cert. denied, No. 80–343 (Jan. 12, 1981)	9
Melamed v. *ITT Continental Baking Co.*, 592 F.2d 290	14
Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co., In re v. *Risjord*, 612 F. 2d 377, vacated and remanded on other grounds, No. 79–1420 (Jan. 13, 1981)	14
Singer v. *United States*, 380 U.S. 24	9
United States v. *Cox*, 580 F. 2d 317	10

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Page

Cases—continued
United States v. *Dinitz*, 424 U.S. 600 ..... 10, 16
United States v. *Dolan*, 570 F. 2d 1177 10
United States v. *Payner*, 447 U.S. 727 16
United States ex rel. Hart v. *Davenport*, 478 F. 2d 203 2
United States v. *Waldman*, 579 F. 2d 649 10
Wood v. *Georgia*, No. 79–6027 (Mar. 4, 1981) 9
Constitution, statutes and rule:
United States Constitution, Sixth Amendment 9, 10, 11, 13
18 U.S.C. 2 2
18 U.S.C. 1952 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
18 U.S.C. 2314 2
28 U.S.C. 1291 13
Fed. R. Crim. P. 44(c) 10, 11

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OPINION BELOW

The order of the court of appeals (Pet. App. 21a-22a) is unreported. The opinion of the district court (Pet. App. 1a-20a) is reported at 498 F. Supp. 450.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1981. A petition for rehearing was denied on February 17, 1981. The petition for a writ of certiorari was filed on March 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 27, 1979, a federal grand jury in the District of New Jersey filed a 15-count indictment

charging petitioners and three others with illegal acts in connection with the ownership of a Nevada gaming corporation, in violation of 18 U.S.C. 2, 1952, 1962(c) and (d), and 2314.

The defendants were arraigned on October 10, 1979. At that time, Oscar B. Goodman was admitted *pro hac vice* to represent the three petitioners. The court thereupon conducted an inquiry pursuant to *United States ex rel. Hart* v. *Davenport,* 478 F.2d 203 (3d Cir. 1973), concerning potential conflicts of interest arising from Goodman's joint representation (Pet. App. 2a–4a; 10/10/79 Tr. 4, *et seq.*). The court pointed out that the divided loyalties of counsel representing multiple defendants could jeopardize the strength of any one defendant's position; that the defense of one could conflict with that of another; that plea bargaining would be hampered, perhaps made impossible, because an offer to one might be adverse to the interests of another; that one defendant's decision to testify might require his own counsel to cross examine him to mitigate testimony adverse to a co-defendant; and that vigorous examination of a witness on behalf of one defendant might have to be curtailed out of deference to the interests of another (10/10/79 Tr. 24, 32–34). The court also expressed concern that the jury might be influenced by the fact that the three defendants, who were charged with conspiracy, were all represented by one lawyer (*id.* at 19). In addition, the court cited the public interest in ordinarily not having a single lawyer represent more than one defendant in a criminal case (*id.* at 17).

Goodman acknowledged the potential for conflicts and stated that petitioners would be represented by independent counsel at trial (Pet. App. 3a), but he requested that he be permitted to represent all three

petitioners prior to trial so that his special knowledge of Las Vegas and its casinos would be available to petitioners (10/10/79 Tr. 18, 21–22, 28; Pet. App. 3a). At the conclusion of the October 10 proceedings, the trial court agreed to this arrangement (Pet. App. 4a).

2. The district court held another hearing on November 5, 1979, at which the government urged that Goodman be disqualified. The government asserted that Goodman's multiple representation had hampered discussions of immunity and cooperation; that Goodman also represented an unindicted co-conspirator; that the government had information that petitioners viewed their relative culpability differently; that Goodman ought not, at the pretrial stage, "lock in" the positions of the independent trial counsel who Goodman recognized would be necessary at trial; and that Goodman's continued representation in a complex proceeding covering a three-year conspiracy with over 100 overt acts only increased the probability of later delay, a mistrial, and appellate attack when petitioners' independent counsel later assumed responsibility (Pet. App. 4a-5a).

Although Goodman continued to urge that he be permitted to remain in the case at the pretrial stages (Pet. App. 5a), he reiterated his understanding that petitioners would have to be represented by separate counsel at trial (11/5/79 Tr. 13, 17; Pet. App. 5a–6a). Goodman also stated that he had told petitioners they would need separate counsel at trial and that they had agreed (11/5/79 Tr. 17; Pet. App. 6a).[1]

At the conclusion of the November 5 hearing, the court ordered petitioners to retain separate counsel

[1] Goodman stated: "I wouldn't let them do it any other way" (11/5/79 Tr. 17; Pet. App. 6a).

(11/5/79 Tr. 35–36; Pet. App. 6a–7a, 9a). In the court's view, separate counsel were required at that time to ensure that the trial would not be delayed at a later date when separate counsel concededly would have to be appointed and would need time to familiarize themselves with the complex case and extensive record (Pet. App. 7a). The court did not, however, order that Goodman be removed from the case altogether. It concluded that separate counsel for each petitioner could make an independent assessment of the extent to which Goodman also could participate in the representation of his client (11/5/79 Tr. 36; Pet. App. 7a). Goodman informed the court that he had anticipated the court's ruling and that discussions were already underway with other counsel (11/5/79 Tr. 36; Pet. App. 8a).

3. On December 10, 1979, the district court held another hearing, attended by the counsel retained to represent each petitioner. Each attorney represented that he had considerable criminal trial experience (Pet. App. 14a) but expressed a desire to have Goodman remain in the case as a general adviser because of his special experience in "the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada" (Pet. App. 10a–11a). Vernon, who was representing petitioner DeLamos, made clear that he, not Goodman, would advise his client (Pet. App. 11a), and the attorneys representing the other two petitioners agreed with Vernon's understanding of Goodman's role (Pet. App. 12a–13a). Petitioners, too, agreed to this arrangement (12/10/79 Tr. 20-24). The district court decided that Goodman could serve in this role until trial, but reserved the question whether Goodman could participate at trial (Pet. App. 13a–14a).

4. On July 29, 1980, during a pretrial hearing, the district court considered the question of Goodman's role at trial. At petitioners' request, it described in general terms the manner in which it would allow Goodman to participate (7/29/80 Tr. 22, 29, 32–33). In its subsequent opinion of September 3, 1980, the court set forth guidelines on this subject. Goodman would not be permitted to make opening or closing statements. Examination of witnesses would be decided on a case-by-case basis: if the court were satisfied that Goodman's expertise would assist petitioners, he would be permitted to examine on their behalf after appropriate instructions to the jury, but Goodman would not be permitted to examine witnesses on narrow questions that pertained only to one of the petitioners. Legal arguments could be made by Goodman to the court, again with appropriate instructions if the argument took place in the presence of the jury. And, finally, Goodman could sit at counsel table to render expert advice to the independent counsel (Pet. App. 19a–20a). Petitioners filed a notice of appeal following the July 29 hearing.

In its September 3 opinion, the district court observed (Pet. App. 16a) that the government's averments the previous November regarding the conflicts Goodman would face if he represented all three petitioners had never been specifically denied by petitioners and that further pretrial developments supported the court's conclusion that petitioners had differing interests in the case and may have engaged in varying activity with the principal government witness. The court therefore was "mystified" by petitioners' apparent suggestion, reflected in the notice of appeal, that Goodman might be permitted to take over the defense of all three petitioners. The court further observed that "[t]he situation is made even more puz-

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zling by the fact that not once but several times Goodman agreed that, at trial, [petitioners] would have separate counsel, that they understood this, and that they were agreeable to this" (Pet. App. 17a).[2]

In a brief order (Pet. App. B 21a–22a), the court of appeals affirmed the district court's order limiting Goodman's role.

ARGUMENT

The district court's careful accommodation of petitioners' interest in having Goodman participate in their trial and the competing objective of preventing

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[2] No motion was ever filed on petitioners' behalf for Goodman to *replace* counsel for all three petitioners. Attorney Vernon, who was representing petitioner DeLamos, did state at the July 29 hearing that his client expected Goodman to represent him throughout the proceedings and that, "if it comes to it," DeLamos would ask Vernon to withdraw to be replaced by Goodman or to have DeLamos defend himself (7/29/80 Tr. 24; see also *id.* at 28). The court later indicated that if Vernon moved to withdraw and to have Goodman substituted, the court would deny the motion (*id.* at 32).

Later still, Vernon stated: "Since my client is here in court I want—I would like to make abundantly clear, considering my request to withdraw and place Mr. Goodman in my place, are you now ruling formally on that?" The court responded: "That's right. I will not permit that. That undercuts everything that I've been trying to accomplish throughout the course of these pretrial proceedings" (*id.* at 35). This brief exchange cannot be treated as a considered motion for and denial of substitution of counsel, as opposed to a discussion of the issue in the hypothetical. At the conclusion of the hearing, for example, Vernon made clear that petitioners were not "seeking to give * * * away" the benefits of separate counsel, but were, instead, "seeking to have [Goodman] in addition to the three of us question [witnesses]" (7/29/80 Tr. 39). Thus, if the transcript is read as a whole, the only issue properly presented to the district court was the degree to which Goodman might participate in the proceedings, not whether Goodman could be *substituted* as counsel for any or all of the petitioners.

conflicts of interest resulting from joint representation does not warrant review at this interlocutory stage of the proceedings.

1. At a number of places in their petition, petitioners discuss (Pet. 12, 14–16, 18) the question whether a trial court may order separate counsel for defendants who purport to waive their right to the effective assistance of counsel insofar as that right might be impaired as a result of the representation of their conflicting interests by a single attorney. Contrary to petitioners' apparent suggestion, however, this case simply does not present that issue.

In the district court, Goodman acknowledged in October and November 1979, that petitioners would need separate counsel at trial, and petitioners agreed to that arrangement. In view of this acknowledgment, the district court was required to ensure separate representation by the time of trial. Cf. *Holloway* v. *Arkansas,* 435 U.S. 475 (1978). Given that separate counsel would be required at *trial,* it was manifestly reasonable for the district court to require, in November 1979, that petitioners have separate counsel at the pretrial stages as well in order to ensure their familiarity with the case and to prevent any postponement of trial that might otherwise have been occasioned by a last-minute appearance of separate counsel. Indeed, petitioners do not argue in their petition that the trial court acted unreasonably in requiring the early appointment of the separate counsel who they and Goodman had conceded would be necessary at trial in any event.

The July 29, 1980, hearing that gave rise to the appeal to the Third Circuit and to the instant certiorari petition concerned only the role Goodman would be permitted to have at trial—which was scheduled to

commence six weeks later—in the context of the separate representation that had been arranged more than eight months earlier. Although the possibility of Vernon's withdrawal from representation of petitioner DeLamos was advanced and rejected in passing at the July 29 hearing, Vernon's suggestion does not appear to have been a considered motion for substitution of counsel (see note 2, *supra*). Moreover, there was no comparable reference whatever by counsel for petitioners Bendetti and Mastro to the possibility of their withdrawal in favor of Goodman. Nor was there any discussion of a waiver by Bendetti and Mastro of any conflicts of interest that might have resulted from Goodman's representation of DeLamos at trial, in view of Goodman's personal representation of Bendetti and Mastro in earlier stages of the case. Thus, the district court was not in a position to rule on a motion for substitution of Goodman as counsel for all three petitioners or for DeLamos alone.

Similarly, the notice of appeal identified the order appealed from as that limiting Goodman's participation; petitioners' brief in the court of appeals presented the single issue whether they were denied their Sixth Amendment rights by the court's order limiting Goodman's participation (Brief for Appellants at 1); and the court of appeals decided only that single question (Pet. App. 21a–22a). The issue of separate counsel was neither presented nor decided. And, even now, petitioners do not take issue with the fact that they will have separate counsel at trial.[3]

[3] Indeed, they rely (Pet. 18–19), somewhat ironically, on the *presence* of separate counsel in support of their argument that Goodman should be permitted to have an unlimited role at

Accordingly, this case does not raise the question whether a court can require defendants to be represented by separate counsel where a conflict of interest appears.[4]

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trial. They suggest that separate counsel will prevent conflicts of interest from arising as a result of Goodman's participation on behalf of all three and will undercut the impression the jury might otherwise have that all three must have been involved in a conspiracy if they are jointly represented by the same attorney.

[4] In any event, as we explain more fully in our brief in opposition in *Lewin* v. *United States*, cert. denied, No. 80-343 (Jan. 12, 1981), at pages 6–10, petitioners err in suggesting (Pet. 14–18) that the Sixth Amendment guarantees a defendant the right to be represented by counsel of his choice even though the attorney may have a conflict of interest. (We are furnishing counsel for petitioners with a copy of our brief in opposition in *Lewin*.) Contrary to petitioners' contention, *Faretta* v. *California*, 422 U.S. 806 (1975), does not support that proposition. The Sixth Amendment right of self-representation recognized in *Faretta* was not premised on a right to waive the assistance of counsel, from which petitioners would infer the right to waive the *effective* assistance of counsel. To the contrary, the Court made clear in *Faretta* that the right of self-representation could *not* be inferred mechanically from the defendant's ability to waive the right to assistance of counsel, because " '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right' " (422 U.S. at 819 n.15, quoting *Singer* v. *United States*, 380 U.S. 24, 34–35 (1965)). Accordingly, the Court's decision in *Wood* v. *Georgia*, No. 79-6027 (Mar. 4, 1981), slip op. 12, that a defendant may be held, after the proceeding, to have waived his right to counsel unimpeded by a conflict of interest does not mean that a defendant has a *right*, in advance of trial, to insist on counsel burdened with a conflict of interest.

The right to proceed personally, recognized in *Faretta*, is an independent right secured by the Sixth Amendment, which con-

Moreover, even assuming that petitioners were properly challenging their representation by separate counsel, the record in this case does not contain any waiver by petitioners of their right to effective, conflict-free counsel at trial, which petitioners concede (Pet. 14–15, 17–18) would be an essential predicate to allowing joint representation by counsel who has a

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fers on the accused, not his attorney, the right to make a defense, 422 U.S. at 819; see *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978). When an accused invokes the assistance of counsel in making his defense, he necessarily does so, as petitioners acknowledge (Pet. 11), subject to reasonable standards governing the conduct of attorneys (*United States* v. *Dinitz*, 424 U.S. 600 (1976); cf. *Leis* v. *Flynt*, 439 U.S. 438 (1979)), including appropriate ethical standards governing conflicts of interest. Thus, contrary to petitioners' contention, defendants do not have a Sixth Amendment right to be jointly represented by the same attorney where the trial court finds a conflict of interest. See Fed. R. Crim. P. 44(c) and the Advisory Committee Note to that Rule.

Petitioners suggest (Pet. 15–16) a conflict among the circuits on the question whether a defendant who waives his right to effective assistance of counsel has a Sixth Amendment right to be represented by conflict-laden counsel. But because this case does not properly present the issue and because the district court found no adequate waiver in any event, it is not the appropriate vehicle for resolving the asserted conflict. Moreover, the decisions relied upon by petitioner—several of which do not even concern the question of a *right* to choose conflict-laden counsel (see *United States* v. *Cox*, 580 F.2d 317 (8th Cir. 1978); *United States* v. *Waldman*, 579 F.2d 649 (1st Cir. 1978))—all predated this Court's observations in *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 & n.11 (1980), regarding the ethical problems inherent in multiple representation, and the December 1, 1980, effective date of Fed. R. Crim. P. 44(c), which authorizes disqualification of counsel even where the defendants purport to waive their right to conflict-free counsel.

conflict of interest. See also Fed. R. Crim. P. 44(c).[5] And the district court, noting that it had "meticulously probed into the matter on more than one occasion" (Pet. App. 16a), could not conclude that any purported "waivers" by petitioners were knowing and intelligent (*ibid.*; see also *id.* at 18a). Under these circumstances, there is no occasion for this Court to consider petitioners' assertion of a Sixth Amendment right to choose counsel who is burdened with a conflict of interest.

2. Because the district court's requirement of separate counsel at trial is not before the Court, this case concerns only the limitations the district court placed on Goodman's participation at trial to supplement the assistance of separate counsel. Petitioners contend that Goodman should be entirely unrestrained at trial and, if they so desire, should be permitted to take over the entire defense. But because the order requiring separate counsel is not before the Court, petitioners cannot challenge that order indirectly by urging that Goodman be allowed to supplant separate counsel entirely at trial despite the conflicts of interest that led

[5] The only discussion in the district court regarding petitioners' consent to joint representation despite the possibility of a conflict of interest occurred at the October hearing (10/10/79 Tr. 32–39), at which Goodman had already conceded that separate representation would be necessary at trial (*id.* at 20, 28). Thus, petitioners' "waiver" at the October hearing, if the exchange with the district court can be so characterized, obviously did not extend to joint representation at trial. Subsequently, of course, the court required separate counsel, and petitioners did not thereafter execute a waiver of any conflicts that might arise if Goodman were to take over the defense completely. Although petitioners assert (Pet. 18) that they have waived any prejudice resulting from joint representation at trial, they cite nothing in the record to support this assertion.

the district court to require the retention of independent counsel in the first place. In any event, the manner in which the district court sought, in the unique circumstances of this case, to accommodate the roles of petitioners' individual counsel with that of Goodman does not warrant review by this Court, especially at the present interlocutory stage of the case.

a. Despite the government's request in November 1979, the district court did not disqualify Goodman from the case altogether. He was allowed to participate in pretrial proceedings and in preparation for trial to the extent desired by counsel for each of the petitioners. The district court's order regarding Goodman's participation at trial necessarily was cast in general terms, with the particulars pertaining to his examination of witnesses and presentation of legal argument to be determined on a case-by-case basis at trial. Therefore, it is not possible in advance of trial to determine whether Goodman will play a major or minor role in these matters.[6] Thus, the factual basis for petitioners' claim necessarily is speculative at this stage.

b. Moreover, insofar as petitioners' claim is that the district court's accommodation of the respective roles of Goodman and petitioners' separate counsel deprives them of effective assistance of counsel, the claim plainly is premature. Only after trial will it be possible to determine whether separate counsel, assisted by Goodman, represented petitioners in a reasonably competent manner and whether any errors that occur will have prejudiced the defense. See, *e.g.*,

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[6] For this reason, petitioners err in stating (Pet. 19) that, under the district court's order, Goodman's role at trial necessarily has been reduced to that of a "silent adviser."

Chambers v. *Maroney*, 399 U.S. 42, 53–54 (1970).[7] In any event, there is nothing in the record developed thus far to suggest that petitioners will not be effectively represented at trial. They do not challenge the competence of their separate counsel, and the district court expressed its satisfaction with separate counsel's assurances that they have substantial experience in trying criminal cases (12/10/79 Tr. 31; Pet. App. 14a).

c. Similarly, there is no merit to petitioners' suggestion that the district court's order deprives them of an asserted Sixth Amendment right to counsel of their choice.[8] For the reasons stated above (see pages 7–11, *supra*), it must be assumed here that Goodman

[7] For this reason, the district court's order regarding Goodman's participation at trial was not immediately appealable under 28 U.S.C. 1291 pursuant to the "collateral order" doctrine insofar as that order implicitly rejected a claim of ineffective assistance of counsel. The district court has not conclusively determined that claim, which may be renewed after trial; it is not completely separate from the merits because, *e.g.*, the attorneys' competence and any resulting prejudice must be considered in light of the prosecution's case and the defense actually presented; and the claim will not be effectively unreviewable on appeal from a final judgment of conviction. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79–1420 (Jan. 13, 1981), slip op. 6.

[8] There is a substantial question whether the order was immediately appealable on this ground either. This Court recently held in a civil case that orders denying motions to disqualify the opposing party's counsel are not appealable final decisions under 28 U.S.C. 1291. *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*. The courts of appeals that previously held orders denying disqualification not to be appealable have not yet taken issue with the appealability of orders *granting* disqualification. See, *e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d 433, 440–441 (2d Cir. 1980) (en banc), vacated and remanded on

could not properly be counsel of record for all three petitioners. Petitioners do not suggest that, if Goodman is unavailable, each of the three attorneys retained to represent them is not counsel of choice for the particular petitioner whom he represents. Thus, for present purposes, these three attorneys must be regarded as petitioners' attorneys of choice. These attorneys will be permitted to consult freely with their respective clients and to participate fully in the proceedings on their behalf. Thus, petitioners have not

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other grounds, No. 80–431 (Jan. 19, 1981); *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co.* v. *Risjord*, 612 F.2d 377, 378 (8th Cir. 1980) (en banc), vacated and remanded on other grounds. No. 79–1420 (Jan 13, 1981); cf. *In re Continental Investment Corp.*, 637 F.2d 1, 7 (1st Cir. 1980); *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1022, 1028 n.41 (D.C. Cir. 1976); but see *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978) (order disqualifying counsel representing grand jury witness not immediately appealable; witness must refuse to testify because he was deprived of counsel and seek review of contempt citation). Nonetheless, it could be argued that a defendant's claim that the district court erred in disqualifying his attorney could adequately be reviewed on an appeal from a final judgment of conviction and therefore would not satisfy the third criterion of the collateral order doctrine.

Similarly here, where Goodman was not even disqualified from the case, it is not apparent why petitioners' claim that Goodman's role was improperly limited could not adequately be reviewed on appeal from a final judgment of conviction. Indeed, it would *better* be reviewed at that stage, when the scope of his participation would be more than a matter of speculation. Thus, the district court's order limiting Goodman's role (see *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, slip op. 10 n.13) is akin to an order on a question of trial procedure, which is not appealable. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

been denied the assistance of counsel of their choice, insofar as that choice was reasonably circumscribed by the application of ethical rules regulating the conduct of attorneys in order to prevent conflicts of interest and thereby to preserve the integrity of the bar and the criminal justice system.

d. Petitioners themselves concede that their asserted right to counsel of their choice "is not absolute and must be balanced against the interests of the court in the effective administration of justice" (Pet. 11). The reasonableness of the manner in which the district court struck that balance on the particular facts of this case is a case-specific issue that does not warrant review by this Court. In any event, the district court's accommodation of the competing interests was reasonable. Although, in our view, the district court might properly have disqualified Goodman from *any* participation in the trial, it acceded to petitioners' wishes to a considerable extent by allowing him to participate insofar as appeared feasible without excessive risk of generating a conflict of interest and thereby defeating the very purpose of ordering separate counsel in the first place. In the situations where the potential for a conflict of interest is particularly strong—as in the opening statement, closing argument, or examination of witnesses on matters that relate to only one or two of the petitioners—it was reasonable for the court to require that the counsel of record for each petitioner, rather than Goodman, represent his client. Such limitations on Goodman's role to prevent a conflict of interest (see *Firestone Tire & Rubber Co.* v. *Risjord, supra,* slip op. 10 n. 13) constitute a reasonable exercise by the court of its authority to regulate the conduct of attorneys appearing before it (*United States* v. *Dinitz,* 424 U.S. 600 (1976); *id.* at 612 (Burger,

C. J., concurring); *United States* v. *Payner*, 447 U.S. 727, 735 n.7 (1980), and of the proceedings over which it presides (cf. *Faretta* v. *California*, *supra*, 422 U.S. at 834–835 n.46).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

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